STATE OF MICHIGAN

COURT OF APPEALS

VECTOR ENVIRONMENTAL GROUP, INC.,

Plaintiff-Appellant,

v

FIFTH THIRD BANK (MICHIGAN),

Defendant-Appellee.

UNPUBLISHED
September 14, 2010

No. 290844
Genesee Circuit Court
LC No. 07-086861-CZ

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition. We affirm.

Plaintiff first argues on appeal that defendant is bound by a prior action in federal court, which determined that Industrial Equipment Company, Inc., of Louisville, Kentucky ("Industrial"), defendant's debtor, held certain "specified funds" in trust for plaintiff. We disagree.

Defendant brought its motion for summary disposition pursuant to MCR 2.116(C)(10). "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews "a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition "is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). In addition, "[w]hether a party's claim is collaterally estopped is an issue of law that we also review de novo." *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004).

On November 13, 2001, Industrial and defendant executed several promissory notes. Each agreement provided that Industrial would grant the bank a security interest in all

Industrial's "now owned or hereafter acquired interests in all property." Therefore, the Uniform Commercial Code governs the relationship between defendant and Industrial.[1] A security agreement[2] was executed the same day. On November 15, 2001, defendant filed a UCC financing statement with the Kentucky Secretary of State, thereby perfecting its security interest. KRS 355.9-310(1)

On August 8, 2006, Industrial executed an assignment to defendant. The assignment stated that Industrial was in default on the following loans: (1) a $3 million revolving note dated June 1, 2004, (2) a $150,000 revolving note dated June 1, 2004, (3) a $250,000 term note dated November 13, 2001, and (4) a $225,000 term note dated October 28, 2002. The document indicated that defendant had elected its rights and remedies under the loan documents by demanding that Industrial immediately surrender possession of the collateral. In addition, "[t]his surrender, transfer, conveyance, and assignment includes, without limitation, all of the following property of [Industrial] of whatever kind and wherever located: cash, cash equivalents, accounts, accounts receivable, inventory . . . ."

Plaintiff argues that as a result of the assignment, when the federal declaratory judgment was entered on May 17, 2007, defendant was not a secured party, but rather, it was Industrial's "pendente lite," with knowledge of the pending action, pursuant to KRS 355.9-622(1)(c). Plaintiff further contends that in *Rohe Scientific Corp v National Bank of Detroit*, 133 Mich App 462, 467; 350 NW2d 280 (1984), rev'd in part on other grds on rehearing 135 Mich App 777 (1984), the case relied upon by the trial court to find that defendant was not bound by the federal judgment, the secured party had not discharged its security interest before entry of the relevant judgment, nor was it an assignee with notice of the litigation. Plaintiff concludes that this Court should look to Section 44 of the Restatement of Judgments 2d, and find that, as a matter of law, defendant is bound by the federal declaratory judgment to the same extent as its assignor, Industrial. We disagree.

KRS 355.9-622(1)(c), on which plaintiff bases his argument, provides that "[a] secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures . . . . [d]ischarges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien." Plaintiff contends that the assignment executed between Industrial and defendant changed defendant's status to an assignee, and "[a]n assignee . . . stands in the shoes of the assignor, subject to all equities and defenses which could have been asserted against the chose in the hands of the assignor at the time of the assignment." *Whayne Supply Co v Morgan Constr Co*, 440 SW2d 779, 782-783 (Ky, 1969). However, if "[t]he existence of a security interest, . . . without more, does not subject a secured party to liability in contract or tort for the debtor's acts or omissions," KRS 355.9-402, then there

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[1] Industrial and its collateral are located in Kentucky, and therefore, Kentucky law governs perfection of defendant's security interest. MCL 440.9301.

[2] A "security agreement" is "an agreement that creates or provides for a security interest." KRS 355.9-102(1)(bu).

would be no reason why a secured party's acceptance of collateral in satisfaction of the debtor's obligation would then subject it to such liability.

Plaintiff further relies on Section 44 of the Restatement Judgments, 2d, however, which states

> A successor in interest of property that is the subject of a pending action to which his transferor is a party is bound by and entitled to the benefits of the rules of res judicata to the same extent as his transferor, unless:
>
> (1) A procedure exists for notifying potential successors in interest of pending actions concerning property, the procedure was not followed, and the successor did not otherwise have knowledge of the action; or
>
> (2) The opposing party in the action knew of the transfer to the successor and knew also that the successor was unaware of the pending action. [Restatement Judgments, 2d, § 44.]

There is no dispute that defendant had notice of the federal lawsuit. Nevertheless, comment e clarifies:

> The rule of this Section relates only to the preclusive effects of the judgment. It *does not deal with the priority among claimants to the property that is the subject of the action. These priorities are determined by the rules governing creditors rights, the effect of attachments, the law of bankruptcy when applicable*, the law of decedent's estates when applicable, and related notice requirements. [Restatement Judgments, 2d, § 44, cmt e.]

Thus even if the federal court's determination that the money was in fact held in trust for plaintiff is binding on defendant, there has been no determination how such a fact would affect defendant's secured interest under the UCC. There is no Kentucky case law (nor any from Michigan) citing this section, let alone applying it to a case such as the one at bar. An Alaska case explaining Section 44 notes that it articulates "the ancient doctrine of lis pendens," under which "persons acquiring an interest in property that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment." *Leisnoi, Inc v Stratman*, 835 P2d 1202, 1208 (Alaska, 1992), citing Restatement Judgments, 2d § 44. As defendant points out, however, defendant did not acquire property from Industrial that was the subject of a lawsuit, but rather, Industrial had, over the course of several years, used money due to plaintiff in order to pay its debt to defendant. All but $3,375.33 of the money in question was transferred to defendant before the assignment on August 8, 2006.

Further, as defendant points out, even if the federal litigation was an in rem proceeding regarding the funds paid by Industrial to defendant over the years, *Rohe*, the case cited by the trial court, indicates that the federal judgment would *not* be binding on defendant. *Rohe* addressed whether collateral estoppel applied to a somewhat similar set of facts. Pursuant to the doctrine of collateral estoppel, relitigation of an issue is prohibited

> in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. This doctrine is strictly applied in that the issues in both cases must be identical, and not merely similar. The previous litigation must have presented a "full and fair" opportunity to litigate the issue presented in the subsequent case. . . . By preventing relitigation, this doctrine attempts to relieve parties of multiple litigation, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. [*Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 340; 657 NW2d 759 (2002).]

In determining whether litigants were parties or privies to a prior action, "a party in this connection is one who is directly interested in the subject matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment." *Duncan v State Highway Com*, 147 Mich App 267, 271; 382 NW2d 762 (1985), quoting *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 42; 191 NW2d 313 (1971). Whereas, "a privy is one who, *after rendition of the judgment*, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase." *Id.* (Emphasis added.)

In *Rohe*, the defendant's interest in a disputed piece of equipment arose after it made a loan to a company and perfected its security interest, which occurred, "long before judgment was entered for the plaintiff in [a] claim and delivery action. [The] [d]efendant therefore does not fall within the Supreme Court's definition of a 'privy,' which requires that the interest be obtained after rendition of the judgment." *Rohe*, 133 Mich App at 467. The Court accordingly rejected "[the] plaintiff's contention that the claim and delivery order precluded defendant from litigating the issue of possession." *Id.*

Similarly, in the case at bar, defendant perfected its security interest in Industrial's collateral in 2001, and therefore, its interest in the disputed funds arose long before the federal judgment was entered in May 2007. Further, while the defendant in *Rohe* took the disputed equipment *after* the first judgment was entered (and thus, clearly had "notice" of the litigation), defendant in the case at bar took possession of the collateral in August 2006, which was *before* the federal judgment was entered. Either way, according to *Rohe*, defendant was not Industrial's privy, and therefore, is not bound by the federal judgment.[3]

Plaintiff next argues that, even if this Court determines that the Restatement of Judgments, 2d, does not apply and defendant was not bound by the federal declaratory judgment, the trial court still erred in failing to recognize that a fiduciary relationship between Industrial and plaintiff arose from either an express, implied, or constructive trust. We disagree.

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[3] It is, therefore, not necessary to determine whether the issue of a constructive trust was "actually litigated" in the federal action.

We first note that the trial court did not directly address this issue. "Generally, to preserve an issue for appellate review, it must be raised by a party and addressed by the trial court." *Heydon*, 275 Mich App 281. However, "this Court may address an unpreserved issue if it involves a question of law and the facts necessary for its resolution have been presented." *Royce v Chatwell Club Apts*, 276 Mich App 389, 399; 740 NW2d 547 (2007). In the trial court, in its response to defendant's motion for summary disposition, plaintiff argued that the funds at issue were held in trust by Industrial, and, in the alternative, there was a joint venture between Industrial, Ford Motor Company, and plaintiff, which would support the conclusion that the funds were held in trust. The trial court determined that the relationship between Industrial and plaintiff was a standard supply agreement, not a joint venture (under both Michigan and Kentucky law), and therefore, Industrial was not required to hold the funds in trust for plaintiff. On appeal, plaintiff appears to concede that a joint venture does not exist because it does not cite any case law – from either Michigan or Kentucky – on the elements of a joint venture. Instead, plaintiff argues that an express, implied, or constructive trust, arose from a May 17, 2006, dispute resolution agreement between plaintiff and Industrial. However, the trial court did not specifically address whether a trust arose independent of any joint venture. Therefore, this issue is not preserved for appeal.

Further, we note that plaintiff's "argument" consists of providing the definition of each type of trust under Michigan law, and then merely stating that Industrial expressly agreed to keep the specified funds separate. Plaintiff also points out that the scope of defendant's security interest was intended to be limited to property actually "owned" by Industrial, as evidenced by the promissory notes and defendant's UCC Filing. In its reply brief, plaintiff lists several reasons why the relationship between Industrial and plaintiff was "not typical," but does not relate this to the law of trusts. "An appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position. Insufficiently briefed issues are deemed abandoned on appeal." *Blackburne & Brown Mortg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004). Nonetheless, we will briefly analyze whether the dispute resolution agreement constituted an express trust (since plaintiff makes no other argument).

On May 17, 2006, plaintiff and Industrial entered into an agreement "to resolve all outstanding disputes regarding the Ford/Industrial/Vector October 2002 Supply Agreement." The agreement provided, inter alia, that:

> 3. *Industrial agrees to pay [plaintiff] in full for all invoices immediately upon receipt of payments from Ford*. Specifically, Industrial will issue a check payable to [plaintiff] for the full amount due [plaintiff] on the same day Industrial receives a check from Ford. Industrial agrees to send each check to [plaintiff] by next day early morning air delivery. *Mark Mivelaz [President and CEO of Industrial] agrees to personally see to it that this procedure is followed for all invoices due Vector*.
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> 4. *Industrial agrees to keep all money payable from Ford under the Supply Agreement totally separate from all of Industrial's other money and agrees that it will not pool money paid by Ford under the Supply Agreement with its other assets*. Mark Mivelaz agrees to personally see to it that the moneys due [plaintiff]

> are not combined with Industrial's other assets and will not be used to make payments to any entity other than [plaintiff].
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> * * *
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> 8. If there are any problems which delay payment in full for each invoice by Ford to Industrial, Industrial agrees to resolve the matter within three days of being informed of the problem.
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> * * *
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> 10. Industrial and Vector agree that all claims to date are settled under this contract. Each party agrees to indemnify, defend, and hold harmless each other against breaches of this agreement. [Emphasis added.]

An express trust may be created "[f]or the beneficial interest of any person or persons where such trust is *fully expressed and clearly defined* upon the face of the instrument creating it . . . ." *Williams v Kent (In re Estate of Kostin)*, 278 Mich App 47, 56; 748 NW2d 583 (2008) (emphasis added), quoting MCL 555.11. Furthermore,

> A sufficient declaration of trust is essential to the creation of an express or voluntary trust . . . . Such trusts are generally created by an instrument or instruments pointing out directly and expressly the property, persons, and purpose of the trust, or by an agreement or contract between the parties expressing the intended trust. The declaration must contain sufficient words to create the trust, and it must embody all the essential elements of a trust. *It must express the intention to create a trust* . . . and state with certainty the terms, subject, persons, and object of the trust; and it has been stated that the trustee must be authorized and directed to perform certain duties and assume certain obligations. A trust is not created unless the settlor imposes enforceable duties on the transferee. [*Fun 'N Sun RV v State (In re Certified Question)*, 447 Mich 765, 791; 527 NW2d 468 (1994).]

Under this law, plaintiff cannot show that an express trust exists because the dispute resolution agreement did not evidence an intent to create a trust, rather, it was a contractual agreement promising payment and specifying a time frame for payment. Further, as expressed in both the supply agreement and this latter agreement, Industrial was entitled to funds from Ford – it was not simply holding the money for plaintiff. Finally, there cannot even be a pretense that industrial intended to create a trust (nor can there be a pretense that it intended to comply with the agreement) because, according to the tracking summary submitted by plaintiff, on the *day after* the parties entered into the above-mentioned contract, Industrial transferred $41,589 of the specified funds to defendant. Therefore, no express trust existed between plaintiff and Industrial.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald